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PRAVNO SHVATANJE USVOJENO U POSTUPKU REŠAVANJA SPORNOG PRAVNOG PITANJA PO ČLANU 176. ZPP

PREKID POSTUPKA PRIVATIZACIJE PREMA SUBJEKTU PRIVATIZACIJE U RESTRUKTURIRANJU, KAO IZVRŠNOM DUŽNIKU I POSTUPAK IZVRŠENJA

Odlukom Agencije za privatizaciju o prekidu postupka privatizacije donetom u toku postupka restrukturiranja, prekidaju se i zakonom propisani rokovi zabrane određivanja ili sprovođenja prinudnog izvršenja i bilo koje mere postupka izvršenja radi namirenja potraživanja subjekta privatizacije za sve vreme dok prekid traje a najduže do isteka roka od 90 dana.

Obrazloženje

Pred Opštinskim sudovima u postupcima izvršenja postoji sporno pravno pitanje dozvoljenosti određivanja i sprovođenja izvršenja kada je izvršni dužnik pravno lice u postupku privatizacije prema kome je Agencija za privatizaciju donela odluku o restrukturiranju a zatim i odluku o privremenom prekidu postupka privatizacije najduže do 90 dana.

Zakon o privatizaciji ("Sl. glasnik RS" br. 38/01, 18/03 i 45/05) je specifičan, tranzicijski zakon koji uređuje uslove i postupak promene vlasništva društvenog, odnosno

državnog kapitala. Zaduženost subjekata privatizacije često otežava sprovođenje postupka privatizacije i uslovljava potrebu za prethodnim restrukturiranjem pravnih lica radi stvaranja uslova za prodaju kapitala ili imovine subjekta privatizacije. Pojam, uslovi i oblici restrukturiranja u postupku privatizacije su regulisani čl. 19. Zakona o privatizaciji.

Odredbama čl. 31. Zakona o izmenama i dopunama Zakona o privatizaciji ("Sl. glasnik RS", br. 45 od 31.05.2005. godine) je propisano da se protiv subjekta privatizacije, odnosno nad njegovom imovinom, za koju je do dana stupanja na snagu ovog zakona doneta odluka o restrukturiranju, ne može odrediti ili sprovesti prinudno izvršenje niti bilo koja mera postupka izvršenja, radi namirenja potraživanja u roku od godinu dana od dana njegovog stupanja na snagu. Ukoliko odluka o restrukturiranju subjekta privatizacije nije doneta do dana stupanja na snagu ovog zakona, protiv subjekta

LEGAL REASONING ADOPTED IN THE RULING PROCEDURE ON THE DISPUTABLE LEGAL MATTER UNDER ARTICLE 176 OF THE PROCEDURAL LAW

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ADJOURNMENT OF PRIVATISATION PROCEDURE AGAINST THE PRIVATISATION SUBJECT IN THE PROCESS OF RESTRUCTURING, AS A JUDGMENT DEBTOR AND THE LEGAL ENFORCEMENT PROCEDURE

Decision of the Privatisation Agency on the adjournment of the privatisation process, passed during the restructuring procedure, terminates also the legally prescribed terms of the ban on setting up or executing the legal enforcement, or any other measure of the legal enforcement procedure aimed at the settlement of claims of the privatisation subject, for the entire duration of the adjournment, and up to 90 days at the latest.

Exposition

Before the Municipal Courts, ruling in procedures of legal enforcement, there stands the disputable legal matter of permissiveness to pronounce and execute legal enforcement when a judgment debtor is a legal entity in the process of privatisation against whom the Privatisation Agency has passed the decision on restructuring, to be followed by the decision on temporary adjournment of the privatisation process for a period of up to 90 days at the latest.

Privatisation Law ("Official Gazette of the Republic of Serbia", No. 38/01, 18/03, and 45/05) is a particular, transition law, regulating terms and conditions as well as the procedure for the change of ownership of the social, i.e. state capital. Indebtedness of the privatisation subject often renders difficult the execution of the privatisation procedure and imposes the requirement for a prior restructuring of the legal entities, with the objective of creating conditions allowing the sale of capital or assets of the privatisation subject. The notion, terms and conditions and forms of restructuring in the privatisation process are regulated in Article 19 of the Privatisation Law.

Under the provisions of Article 31 of the Law on Amendments to the Privatisation Law ("Official Gazette of the Republic of Serbia", No. 45 of 31 May 2005), it is prescribed that against the privatisation subject, i.e. against his assets which are ruled by the restructuring

privatizacije, odnosno nad njegovom imovinom, prinudno izvršenje ne može se odrediti ili sprovesti u roku od dve godine od dana donošenja odluke o restrukturiranju. Postupak prinudnog izvršenja koji je u toku, prekida se. Iz navedenog proizilazi da je prema subjektima privatizacije za koje je odluka o restrukturiranju doneta pre stupanja na snagu citiranog Zakona o izmenama i dopunama Zakona o privatizaciji, zabrana određivanja i sprovođenja izvršenja trajala do 08.06.2006. godine.

Odredbama čl. 14. Zakona o izmenama i dopunama Zakona o privatizaciji ("Sl. glasnik RS", br. 45/05) je propisano da se Zakon o privatizaciji u čl. 25a) stav 1. menja i glasi: "Ako u toku sprovođenja postupka privatizacije nastupe okolnosti koje onemogućavaju prodaju kapitala, odnosno imovine subjekta privatizacije za koju se nije znalo u vreme pokretanja postupka, Agencija može da odredi prekid postupka koji traje dok postoje razlozi za prekid, a najduže 90 dana od dana donošenja odluke o prekidu. Dok traje prekid postupka prestaju da teku propisani rokovi." Citirane odredbe propisuju pravne posledice prekida postupka privatizacije, ali ne određuju bliže koji rokovi se prekidaju za vreme prekida postupka privatizacije, već postoji samo opšta formulacija o prestanku toka propisanih rokova, bez propisanih izuzetaka.

Kod ocene da li se prekid propisanih rokova za vreme prekida postupka privatizacije odnosi i na rokove propisane za subjekte privatizacije u restrukturiranju, neophodno je definisati

pravni institut restrukturiranja u postupku privatizacije i cilj koji se njegovim propisivanjem želeo da ostvari.

Restruktiriranje subjekta privatizacije je moguća a ne i obavezna faza u okviru postupka privatizacije koja prethodi postupku prodaje kapitala ili imovine subjekta privatizacije. Radi se o vrsti poravnanja, koju verifikuje Agencija za privatizaciju prihvatanjem programa restrukturiranja sa ciljem zaštite subjekata privatizacije i poverilaca. Restruktiriranje omogućava da se izbegne stečaj, da se subjekt privatizacije stabilizuje i osposobi i da se stvore uslovi za sprovođenje privatizacije.

Polazeći od zakonskih uslova i razloga donošenja odluka o prekidu postupka privatizacije i restrukturiranju subjekta privatizacije, sledi da prekid propisanih rokova za vreme prekida postupka privatizacije podrazumeva i prekid rokova trajanja zabrane određivanja i sprovođenja izvršenja i bilo kojih mera postupka izvršenja radi namirenja potraživanja prema subjektu privatizacije u restrukturiranju. Obaveze subjekta privatizacije iz izvršnih isprava se time ne gase, već se dodatnim rokom stvaraju povoljniji uslovi da se subjekt privatizacije konsoliduje, okonča privatizacija i poverioci namire u jednakom tretmanu.

*(Pravno shvatanje Građanskog odeljenja
Vrhovnog suda Srbije utvrđeno i verifikovano na
sednici od 22.12.2006. godine)*

decision passed until the day of coming into force of this Law, no legal enforcement may be pronounced or executed and neither any measure of the legal enforcement procedure for purpose of settlement of claims, within a period of one year counting from the day of its coming into force and effect. In case the privatisation subject restructuring decision has not been passed up to the day of coming into force of this Law, against the privatisation subject, i.e. against his assets, legal enforcement may not be pronounced or executed within the time period of two years, counting from the day of passing the restructuring decision to that effect. Legal enforcement procedure, which is in the process of execution, shall be adjourned. The above stated implies that against the privatisation subjects, where the restructuring decision was passed prior to the coming into force of the cited Law on Amendments of the Privatisation Law, the ban on pronouncing and executing legal enforcement would remain in force until 8 June 2006.

Provisions under Article 14 of the Law on Amendments to the Privatisation Law ("Official Gazette of Republic of Serbia", No. 45/05) prescribe that the Privatisation Law in Article 25 a) para 1 is amended and reads as follows: "If during the privatisation procedure there should arise circumstances that would render impossible the sale of capital, i.e. the sale of assets of the privatisation subject, those circumstances not having been known at the time of initiating the procedure, the Agency may pronounce the adjournment of the procedure lasting for a period of time for which the reasons for the adjournment shall persist, but for a period of not later than 90 days from the day of pronouncing its decision on the adjournment. Throughout the duration of the adjournment of the procedure the prescribed deadlines shall be suspended." The above quoted provisions prescribe legal consequences of the privatisation procedure adjournment, but do not regulate in any detail the termed deadlines which are to be suspended during the adjournment of the privatisation procedure, leaving only a general formulation of the suspension of prescribed deadlines, without prescribed exemptions.

In the assessment of the matter as to

whether the suspension of the prescribed deadlines for the duration of the adjournment of the privatisation procedure also refers to the deadlines prescribed for privatisation subjects in the restructuring procedure, it is necessary to define the legal institute of the restructuring in the privatisation procedure, and the intended objective to be achieved by prescribing the same.

Restructuring of a privatisation subject remains a possible but not a mandatory phase within the framework of the privatisation procedure, the phase preceding the procedure of the sale of capital or assets of the privatisation subject. Actually, this is the matter of a kind of settlement to be verified by the Privatisation Agency by accepting the restructuring programme with the aim of protecting both the privatisation subject and its creditors. Restructuring allows for the bankruptcy to be avoided, for the privatisation subject to be stabilised and rendered capable again, and for the conditions to be created for the privatisation procedure to be conducted.

Starting from the statutory terms and conditions for passing the decision on the adjournment of the privatisation procedure and on the restructuring of the privatisation subject, what follows is the argument that the suspension of the prescribed deadlines during the adjournment of the privatisation procedure also cover the suspension of deadlines for the pronouncement and execution of legal enforcement, and also any other measures of the legal enforcement procedure for purpose of settlement of claims against the privatisation subject in the process of restructuring. Liabilities of the privatisation subject from the enforcement documents shall not be thereupon deemed extinct, but with additional timeframe allowed, more favourable conditions are thereby created for the privatisation subject to consolidate, privatisation to complete, and liabilities towards creditors to be discharged on equitable terms.

(Legal reasoning rendered by the Civil Division of the Supreme Court of Serbia, as certified and verified at the session held on 22 December 2006)

PRIMENA ODREDBE ČLANA 31. ZAKONA O IZMENAMA I DOPUNAMA ZAKONA O PRIVATIZACIJI U IZVRŠNOM POSTUPKU

Nova odluka Agencije za privatizaciju Republike Srbije o restrukturiranju istog subjekta privatizacije - izvršnog dužnika ima pravna dejstva ranije donete odluke o njegovom restrukturiranju i sprečava nastavak prekinutog postupka i sprovođenja novog izvršenja.

Obrazloženje:

Opštinski sud u Novom Sadu uputio je Vrhovnom sudu Srbije zahtev za rešavanje spornog pravnog pitanja, u kome je navedeno da je tokom 2004. godine taj sud doneo više rešenja o izvršenju protiv dužnika - preduzeća, po predlozima poverilaca - zaposlenih radnika, radi naplate potraživanja neisplaćenih zarada, plenidbom novčanih sredstava na računu dužnika i prenosom zaplenjenih iznosa na račun poverilaca (izvršni naslovi su pravnosnažne presude), s tim što su doneta rešenja o prekidu postupka sprovođenja izvršenja, na osnovu čl. 20. stav 4. Zakona o privatizaciji ("Sl. glasnik RS" br. 38/01), s obzirom da je 28.10.2003. godine Agencija za privatizaciju RS donela odluku o restrukturiranju preduzeća - dužnika. Dana 09.06.2006. godine poverioci su podneli predloge za nastavak postupka sprovođenja izvršenja pozivajući se na odredbe čl. 31. stav 1. Zakona o izmenama i dopunama Zakona o privatizaciji ("Sl. glasnik RS", br. 45/05), pošto je protekao rok od godinu dana od dana stupanja na snagu ovog Zakona, u kome se protiv subjekta privatizacije, odnosno nad njegovom imovinom nije moglo odrediti ili sprovesti prinudno izvršenje niti bilo koja mera postupka izvršenja radi namirenja potraživanja. Međutim, 08.06.2006. godine Agencija za privatizaciju RS donela je na osnovu čl. 9. stav 1. tač. 7. Zakona o Agenciji za privatizaciju ("Sl. glasnik RS" br. 38/01 i 135/04), a u vezi čl. 20. stav 2. Uredbe o postupku i načinu restrukturiranja subjekata privatizacije ("Sl. glasnik RS" br. 52/05) odluku o pokretanju novog restrukturiranja subjekta privatizacije - dužnika. U dopisu Agencije za privatizaciju upućenom sudu potvrđeno je da je donošenjem označene odluke započet novi postupak restrukturiranja preduzeća.

Razlog zbog koga se Opštinski sud obratio

Vrhovnom sudu za rešenja spornog pravnog pitanja je taj što podnosilac zahteva smatra da iz odredaba Zakona o privatizaciji nedvosmisleno ne proizilazi da odluka o pokretanju novog restrukturiranja, doneta na osnovu čl. 20. stav 2. Uredbe o postupku i načinu restrukturiranja subjekata privatizacije ima pravno dejstvo odluke o restrukturiranju iz čl. 7. Uredbe, odnosno da se, u konkretnom slučaju, postupci sprovođenja izvršenja, koji su prekinuti na osnovu čl. 20. stav 4. Zakona o privatizaciji, jer je doneta odluka o restrukturiranju dužnika, mogu nastaviti s pozivom na odredbu čl. 31. stav 1. Zakona o izmenama i dopunama Zakona o privatizaciji, a nakon što će, pre isteka roka od godinu dana od dana njegovog stupanja na snagu, doneta odluka o pokretanju novog restrukturiranja (čl. 20. tač. 2. Uredbe), tj. da se po proteku roka od godinu dana od stupanja Zakona na snagu, može protiv izvršnog dužnika - subjekta privatizacije, dozvoliti izvršenje ili se ima primeniti čl. 31. stav 2. Zakona.

U spisima se nalaze odluke Agencije za privatizaciju RS o restrukturiranju preduzeća - dužnika od 28.10.2003. godine i o pokretanju novog restrukturiranja od 08.06.2006. godine.

Odredbom čl. 20. stav 4. Zakona o privatizaciji određeno je da u toku sprovođenja restrukturiranja poverioci ne mogu da preduzimaju radnje radi prinudne naplate svojih dospelih potraživanja.

Prema čl. 31. Zakona o izmenama i dopunama Zakona o privatizaciji, protiv subjekta privatizacije, odnosno nad njegovom imovinom, za koji je do dana stupanja na snagu ovog Zakona doneta odluka o restrukturiranju, ne može se odrediti ili sprovesti prinudno izvršenje niti bilo koja mera postupka izvršenja, radi namirenja potraživanja u roku od godinu dana od dana njegovog stupanja na snagu, a ako odluka o restrukturiranju subjekta privatizacije nije doneta do dana stupanja na snagu ovog Zakona, protiv subjekta privatizacije, odnosno nad njegovom imovinom, prinudno izvršenje ne može se odrediti ili sprovesti u roku od dve godine od dana donošenja odluke o

APPLICATION OF THE PROVISIONS OF ARTICLE 31 OF THE LAW ON AMENDMENTS TO THE PRIVATISATION LAW IN THE LEGAL ENFORCEMENT PROCEDURE

The new decision of the Privatisation Agency of the Republic of Serbia on the restructuring of the same privatisation subject - judgment debtor, retains all the legal action of the previously passed Decision on the subject's restructuring, and serves to prevent the continuation of the adjourned procedure and the execution of the new enforcement.

Exposition

Municipal Court in Novi Sad submitted to the Supreme Court of Serbia a request for ruling of the disputable legal matter, where it was stated that during 2004, this Court had passed several decrees on the legal enforcement against debtor - company, at the proposal of the creditors - persons employed, for purpose of collecting claims in unpaid remunerations - salaries, by seizure of monetary funds kept on the account of the debtor, and by transferring so seized funds on to the account of the creditors (executive titles in the legally binding judgment), but the decrees were passed on the suspension of the legal enforcement procedure in accordance with Article 20 para 4 of the Privatisation Law ("Official Gazette of Republic of Serbia", No. 38/01), as the Privatisation Agency of the Republic of Serbia passed the decision, on 28 October 2003, on the restructuring of the debtor company. On 9 June 2006, creditors submitted proposals for the continuation of the legal enforcement procedure recalling the provision under Article 31 para 1 of the Law on Amendments to the Privatisation Law ("Official Gazette of the Republic of Serbia", No. 45/05), as the prescribed time period of one year from the coming into force of this Law had elapsed, in which it was not possible either to pronounce or execute legal enforcement, nor any other measure of the enforcement procedure for purpose of settling the claims. However, on 8 June 2006, Privatisation Agency of the Republic of Serbia passed a Decision, in accordance with the provisions of Article 9 para 1 item 7 of the Law on the Privatisation Agency ("Official Gazette of Republic of Serbia", No. 38/01 and

135/04), in connection with Article 20 para 2 of the Regulation on the procedure and manner of restructuring privatisation subjects ("Official Gazette of Republic of Serbia", No. 52/05), thus a Decision on initiating a new restructuring of the privatisation subject - the debtor company. In the letter submitted by the Privatisation Agency to the Court, it was confirmed that by passing of the designated Decision, a new procedure was initiated in the restructuring of the respective company.

The grounds on which the Municipal Court addressed the Supreme Court requesting ruling on the disputable legal matter was that the applicant submitting the ruling request holds that the provisions of the Privatisation Law do not unequivocally prescribe that the decision on initiating a new restructuring procedure, passed in accordance with the provisions of Article 20 para 2 of the Regulation on the procedure and manner of restructuring of privatisation subjects, has the same legal effect as the decision on restructuring from Article 7 of the Regulation, i.e. that in this particular case, the legal enforcement procedure, that has been suspended in accordance with provisions of Article 20 para 4 of the Privatisation Law, because the decision was passed on restructuring of the debtor, may be continued by the recall of the provision under Article 31 para 1 of the Law on Amendments to the Privatisation Law, after the expiry of the one-year period from its coming into force, the decision passed on the initiation of the new restructuring (Article 20 item 2 of the Regulation), i.e. upon the expiry of the time period of one year from the coming into force of the Law, it will be possible against the judgment debtor - privatisation subject to allow for the legal enforcement procedure to be executed, or the provisions of Article 31 para 2 of the Law to apply.

In the writs of the case there are decisions of the Privatisation Agency of the Republic of Serbia, one of the decisions decreeing restructuring of the debtor company, of 28 October 2003, and the other decision, of 8 June 2006, initiating new restructuring.

restrukturiranju, dok se postupak prinudnog izvršenja koji je u toku, prekida.

Članom 9. stav 1. tač. 7. Zakona o Agenciji za privatizaciju regulisano je da u obavljanju poslova sprovođenja privatizacije, Agencija sprovodi restrukturiranje u postupku privatizacije ili upućuje zahtev nadležnom organu da sprovede restrukturiranje u postupku privatizacije.

Uredba o postupku i načinu restrukturiranja subjekata privatizacije u članu 20. tač. 2. predviđa da ako u obavljanju poslova kontrole sprovođenja restrukturiranja nastupe okolnosti iz kojih proizilazi da sprovođenje programa restrukturiranja nije moguće, delimično ili u celini, Agencija za privatizaciju može da pokrene novo restrukturiranje. Član 7. ove Uredbe glasi: "Agencija pokreće restrukturiranje subjekta privatizacije donošenjem odluke o restrukturiranju. Odluka iz stava 1. ovog člana donosi se, naročito, u slučajevima: 1. nemogućnosti sprovođenja postupka privatizacije subjekta privatizacije u postojećem statusnom, odnosno organizacionom obliku ili u postojećoj pravnoj formi; 2. nemogućnosti sprovođenja postupka privatizacije subjekta privatizacije sa postojećom strukturom kapitala; 3. kada obaveze subjekta privatizacije prevazilaze ukupnu vrednost aktive umanjenu za iznos gubitka tekuće i ranijih godina".

Na sednici Građanskog odeljenja Vrhovnog suda Srbije od 30.06.2003. godine usvojeno je pravno mišljenje u vezi primene odredbe člana 20. stav 4. Zakona o privatizaciji u izvršnom postupku, objavljeno u Biltenu sudske prakse br. 3, decembra meseca 2005. godine (sud će pozivom na odredbu čl. 20. stav 4. Zakona o privatizaciji prekinuti samo postupak sprovođenja a ne i postupak izvršenja prinudne naplate novčanog potraživanja, određenog rešenjem o izvršenju, donetim pre datuma pokretanja postupka restrukturiranja izvršnog dužnika. Sud će dozvoliti predloženo izvršenje radi namirenja novčanog potraživanja i u slučaju kada je takav predlog podnet nakon pokretanja postupka restrukturiranja, ali će istovremeno sa rešenjem o dozvoli izvršenja doneti rešenje o prekidu postupka njegovog sprovođenja).

Dakle, Zakon o izmenama i dopunama Zakona o privatizaciji stupio je na snagu

08.06.2005. godine, odluka o restrukturiranju preduzeća dužnika doneta je 28.10.2003. godine, a odluka o pokretanju novog restrukturiranja 08.06.2006. godine.

Iz obrazloženja odluke Agencije za privatizaciju Republike Srbije od 08.06.2006. godine o pokretanju novog restrukturiranja dužnika proizilazi da je doneta zato što je u obavljanju postupka kontrole sprovođenja restrukturiranja Agencija za privatizaciju utvrdila da su nastupile okolnosti usled kojih sprovođenje programa restrukturiranja nije moguće i da je pokrenuto novo restrukturiranje radi omogućavanja preduzimanja mera kojima bi se omogućilo sprovođenje restrukturiranja. S obzirom da je članom 32. Zakona o izmenama i dopunama Zakona o privatizaciji predviđeno da se odredbe ovog Zakona primenjuju na subjekte privatizacije koji se restrukturira u postupku privatizacije za koji do dana stupanja na snagu ovog Zakona, Agencija nije donela odluku o prihvatanju programa restrukturiranja, izvesno je da u ovom slučaju ima mesta primeni čl. 31. stav 2. Zakona o izmenama i dopunama Zakona o privatizaciji, pošto je očigledno da je odluka o pokretanju novog restrukturiranja dužnika usledila upravo iz razloga što Agencija nije donela odluku o prihvatanju programa restrukturiranja u vezi prvobitne odluke o restrukturiranju preduzeća od 28.10.2003. godine. Ovo je u skladu sa ciljem i načelima privatizacije, uređenom postupku i načinu restrukturiranja subjekata privatizacije i postojanjem mogućnosti da se, u tačno određenim slučajevima, pokrene novo restrukturiranje preduzeća.

Pri tom, rokovi iz čl. 31. Zakona o izmenama i dopunama Zakona o privatizaciji predviđeni su radi ubrzanja postupka privatizacije od donošenja odluka o privatizaciji, a prekid izvršnog postupka određen da bi se restrukturiranje sprovedo i privredni subjekt doveo u stanje ekonomske stabilnosti.

Kada Agencija za privatizaciju ima ovlašćenje da pokrene novo restrukturiranje zbog nepredviđenih poteškoća u tom procesu i o tome donese odluku, očigledno je da za to postoji opravdani cilj i da je to jedna od mera da bi se omogućilo sprovođenje restrukturiranja, a izbegao stečaj, koji je najnepovoljniji po prava zaposlenih. Donošenje, pak, novog rešenja o

Provisions under Article 20 para 4 of the Privatisation Law prescribe that during the execution of the restructuring process, creditors shall not be allowed to undertake actions aimed at enforceable collection of their matured claims.

Under Article 31 of the Law on Amendments to the Privatisation Law, against the privatisation subject, i.e. against his assets, where the decision on restructuring has been passed until the day of coming into force of this Law, it is not allowed to pronounce or execute legal enforcement, and neither any other measure of the enforcement procedure aimed at settlement of claims within the time period of one year from its coming into force, and if the decision on restructuring of the privatisation subject has not been passed until the day of coming into force of this Law, against the privatisation subject, i.e. against his assets, legal enforcement may not be pronounced or executed within the time period of two years from the day of passing of the decision on restructuring, and the legal enforcement procedure that is in progress is thereby adjourned.

Article 9 para 1 item 7 of the Law on Privatisation Agency prescribes that in the execution of the privatisation actions the Agency shall conduct restructuring in the privatisation procedure, or shall submit a request to the competent authority to undertake restructuring in the privatisation procedure.

Regulation on the procedure and manner of restructuring of the privatisation subjects, in its Article 20 item 2 prescribes that, if during the work on control of the restructuring implementation there should arise circumstances resulting in the inability to continue with the restructuring programme, either in part or in full, Privatisation Agency may initiate new restructuring. Article 7 of this Regulation reads as follows: "Agency shall initiate restructuring of the privatisation subject by passing a decision on restructuring. Decision from para 1 of this Article shall pertain, in particular, to the following cases: 1. Inability to implement privatisation process of the privatisation subject in his actual existing status, or organisational form, or in the actual existing legal form; 2. Inability to implement privatisation process of the privatisation subject with his actual existing capital structure; 3. If

the liabilities of the privatisation subject exceed the total value of assets reduced for the amount of losses incurred during the current and the previous years."

At the session of the Civil Division of the Supreme Court of Serbia, held on 30 June 2003, legal opinion was adopted in connection with the application of the provisions under Article 20 para 4 of the Privatisation Law in the legal enforcement procedure, as published in the Judicial Practices Bulletin No. 3, in December 2005 (The Court shall, by recalling the provision under Article 20 para 4 of the Privatisation Law, adjourn only the procedure of implementation, but not the procedure of execution of legally enforced collection of monetary claims, pronounced in the decree on legal enforcement, passed prior to the date of initiating the procedure of restructuring of the judgment debtor. The Court shall allow for the proposed execution to be conducted for purpose of settlement of monetary claims, and this even in the case when such a proposal was submitted after the initiation of the restructuring procedure, but shall simultaneously with the decree on the permission to execute legal enforcement procedure, pass the decree on the suspension of the procedure of its execution).

Thus, the Law on Amendments to the Privatisation Law came into force on 8 June 2005, Decision on restructuring of the debtor company was passed on 28 October 2003, and the Decision on initiating new restructuring was passed on 8 June 2006.

In the arguments given in the exposition of the Decision passed by the Privatisation Agency of the Republic of Serbia on 8 June 2006, on the initiation of the new restructuring of the debtor, it derives that it was passed because during the process of control over the restructuring implementation, the Privatisation Agency determined that there were circumstances that occurred rendering impossible implementation of the restructuring programme, and that the new restructuring was initiated in order to allow for undertaking of measures that would enable implementation of the restructuring. In view of the fact that under Article 32 of the Law on Amendments to the Privatisation Law it is prescribed that the provisions of this Law shall apply to the privatisation subject which is being

restrukturiranju, znači, poštovanje rokova za prekid postupka iz čl. 31. Zakona o izmenama i dopunama Zakona o privatizaciji.

*(Pravno shvatanje Građanskog odeljenja
Vrhovnog suda Srbije utvrđeno na sednici od 7.
novembra 2006. godine)*



PRAVA IZVRŠNIH POVERILACA KOJI NISU OTPUSTILI DUG PREMA SUBJEKTU PRIVATIZACIJE KAO IZVRŠNOM DUŽNIKU

1. Po isteku rokova iz člana 31. Zakona o izmenama i dopunama Zakona o privatizaciji može se nastaviti prekinuti postupak izvršenja i odrediti druga izvršenja prema subjektu privatizacije.

2. Poverioci koji nisu otpustili dug prema subjektu privatizacije svoja potraživanja i nakon prihvatanja programa restrukturiranja subjekta privatizacije mogu namiriti od subjekta privatizacije kao izvršnog dužnika, s tim da se o uslovima i načinu namirenja mogu sporazumeti sa kupcem kapitala.

Obrazloženje

Opštinski sud u Kragujevcu pokrenuo je na osnovu člana 176. i 177. ZPP postupak pred Vrhovnim sudom Srbije radi rešavanja spornog pravnog pitanja koje se kod tog suda

u većem broju izvršnih predmeta pojavljuje kao prejudicijelno. Uz zahtev dostavljena su četiri izvršna predmeta i izneta argumentacija o spornom pravnom pitanju.

Prema podnetim zahtevima Opštinskog suda u Kragujevcu postavljaju se sporna pravna pitanja da li se po proteku roka od godinu dana propisanog članom 31. stav 1. Zakona o izmenama i dopunama Zakona o privatizaciji može protiv izvršnog dužnika - subjekta privatizacije nastaviti postupak sprovođenja ranije određenog izvršenja i dozvoliti izvršenje u mnogim predmetima ili promenom člana 23-a) Zakona o izmenama i dopunama Zakona o privatizaciji, s obzirom da je program restrukturiranja dužnika usvojen i u smislu navedenog člana stav 1. i 2. isti postao izvršni

restructured in the privatisation process, and for which until the day of coming into force of this Law the Agency did not pass the decision on accepting the restructuring programme, it is certain that in this case it is appropriate to apply Article 31 para 2 of the Law on Amendments to the Privatisation Law, as it is obvious that the decision on initiating new restructuring of the debtor has taken place actually for the reason that the Agency did not pass the decision on accepting the restructuring programme in connection with the initial decision on the restructuring of the company of 28 October 2003. This is concordant with the aims and principles of privatisation, regulated procedure and manner of restructuring of the privatisation subjects, and also with the existing options to initiate, in precisely specified cases, a new restructuring of a respective company.

Furthermore, terms and conditions under Article 31 of the Law on Amendments to the Privatisation Law are intended for acceleration of the privatisation process, starting from the very moment of passing of the privatisation decision, while the adjournment of the legal

enforcement procedure is prescribed in order to allow for the implementation of the restructuring and the time for the legal entity in question to be rendered capable of economic stability.

Once the Privatisation Agency is vested with the power to initiate new restructuring due to the unforeseeable difficulties arising in this process, and to pass a decision to that effect, obviously there must be a justified objective for doing so, and that this presents one of the measures allowing for the implementation of the restructuring, with the aim of avoiding bankruptcy as the most adverse form undermining rights of the workforce employed. Nevertheless, passing of the new decree on restructuring must imply the respect of the deadlines for the adjournment of the procedure, as set in Article 31 of the Law on Amendments to the Privatisation Law.

(Legal reasoning rendered by the Civil Division of the Supreme Court of Serbia as verified at the session held on 7 November 2006)

RIGHTS OF JUDGMENT CREDITORS THAT HAVE NOT RELEASED DEBT AGAINST PRIVATISATION SUBJECT AS A JUDGMENT DEBTOR

1. Upon expiry of deadlines set under Article 31 of the Law on Amendments and Supplements to the Privatisation Law, the adjourned legal enforcement procedure may be continued and other legal enforcements pronounced against the privatisation subject.

2. Creditors, who have not released debt against the privatisation subject, may collect their claims from the privatisation subject as a judgment debtor even after the acceptance of the restructuring program of the privatisation subject, provided they shall agree on terms and conditions of settlement with the buyer of capital.

Exposition

Municipal Court in Kragujevac initiated a procedure before the Supreme Court of Serbia, on the grounds of Articles 176 and 177 of the

Procedural Law, for purpose of ruling on the disputable legal matter appearing in a large number of enforceable cases tried before this court of law, disputable legal matter appearing as a prejudicial form of reasoning. Request submitted to the Supreme Court for ruling was supported by four enforceable cases and the arguments were presented on the disputable legal matter at hand.

According to the request submitted by the Municipal Court in Kragujevac, the disputable legal matters are raised as to whether after the expiry of the time period of one year, as prescribed under Article 31 para 1 of the Law on Amendments to the Privatisation Law, it is possible to continue the procedure of execution of the previously pronounced

naslov, pa sud ne može sprovoditi izvršenje na osnovu ranije donetih rešenja o izvršenju, niti dozvoliti izvršenje u novim predmetima.

U obrazloženju zahteva za pokretanje postupka za rešavanje spornog pravnog pitanja je navedeno da je Opštinski sud u Kragujevcu tokom 2002. godine, 2003. godine i 2004. godine na osnovu izvršnih isprava (izvršnih presuda) po predlozima poverilaca doneo više rešenja o izvršenju protiv dužnika DP Industrija "Filip Kljajić" iz Kragujevca, radi naplate potraživanja poverilaca, a zatim su doneta rešenja o prekidu postupka sprovođenja izvršenja na osnovu člana 20. stav 4. Zakona o privatizaciji ("Službeni glasnik RS", br. 38/01 i 18/03), s obzirom da je dana 1. 9. 2004. godine Agencija za privatizaciju Republike Srbije donela odluku o restrukturiranju preduzeća - dužnika.

Obzirom da je prema dužniku doneta odluka o restrukturiranju pre stupanja na snagu Zakona o izmenama i dopunama Zakona o privatizaciji ("Službeni glasnik RS", br. 45/05), koji je stupio na snagu dana 8. 6. 2005. godine, u ovim postupcima primenjen je član 31. stav 1. navedenog Zakona kojim je propisano da se protiv subjekta privatizacije odnosno nad njegovom imovinom, za koji je do dana stupanja na snagu ovog zakona doneta odluka o restrukturiranju, ne može odrediti i sprovesti prinudno izvršenje niti bilo koja mera postupka izvršenja radi namirenja potraživanja u roku od godinu dana od dana stupanja na snagu ovog zakona, a stavom trećim istog člana je propisano da se postupak prinudnog izvršenja koji je u toku prekida.

Međutim, Agencija za privatizaciju Republike Srbije je na osnovu člana 25-a) Zakona o privatizaciji zaključcima od 02.06.2006. godine i 04.09.2006. godine prekidala postupak privatizacije dužnika (pre isteka roka od jedne godine predviđenog članom 31. stav 1. Zakona o izmenama i dopunama Zakona o privatizaciji) za period dok postoje razlozi koji onemogućavaju prodaju kapitala, odnosno imovine, a najduže 90 dana od donošenja pomenutih zaključaka i kako je istim zaključcima određeno da dok traje prekid postupka privatizacije prestaju da teku svi propisani rokovi (a samim tim i rok od godine dana iz člana 31. stav 1. Zakona o izmenama i dopunama Zakona o privatizaciji) to je rok propisan članom 31. stav 1. Zakona o

izmenama i dopunama Zakona o privatizaciji istekao 04.12.2006. godine.

Dana 04.12.2006. godine Agencija za privatizaciju Republike Srbije donela je zaključak o nastavku postupka privatizacije subjekta privatizacije (izvršnog dužnika). Isto tako, dana 11.10.2006. godine, Agencija je donela rešenje o prihvatanju Programa restrukturiranja navedenog subjekta privatizacije.

Poverioci su u decembru 2006. godine podneli predloge za nastavak postupka sprovođenja izvršenja prema dužniku, navodeći da je protekao rok od godinu dana za prekid postupka propisan članom 31. stav 1. Zakona o izmenama i dopunama Zakona o privatizaciji, a isto tako su i predložili da se dozvoli izvršenje u novim predmetima.

Međutim, dužnik smatra da se protiv njega, kao subjekta privatizacije, ne može dozvoliti izvršenje, niti nastaviti postupak sprovođenja izvršenja, s obzirom da se postupak restrukturiranja nalazi u završnoj fazi i da je Agencija za privatizaciju Republike Srbije dana 11.10.2006. godine, donela rešenje o prihvatanju programa restrukturiranja, koji ima snagu izvršne isprave i smatra se ugovorom kojim se utvrđuje visina i način izmirivanja potraživanja poverioca u smislu člana 23-a) stav 1. Zakona o izmenama i dopunama Zakona o privatizaciji.

Na kraju je navedeno, da su po oceni suda rokovi iz člana 31. Zakona o izmenama i dopunama Zakona o privatizaciji predviđeni radi ubrzanja postupka privatizacije od donošenja odluke o privatizaciji, a da je prekid izvršnog postupka određen da bi se restrukturiranje sprovelo i privredni subjekt doveo u stanje ekonomske stabilnosti.

Vrhovni sud smatra da se radi o spornom pravnom pitanju od prejudicijelnog značaja i u većem broju predmeta, što opravdava zahtev za njegovo razmatranje i zauzimanje pravnog shvatanja u smislu odredbi člana 176. do 180. Zakona o parničnom postupku.

Pravni izvori privatizacije su Zakon o privatizaciji ("Službeni glasnik RS", br. 38/01, 18/03 i 45/05), Zakon o Agenciji za privatizaciju ("Službeni glasnik RS", br. 38/01 i 135/04) i Zakon o aukcijskom fondu ("Službeni glasnik RS", br. 38/01 i 45/05), a od podzakonskih akata Uredba o postupku i načinu restrukturiranja subjekta privatizacije ("Službeni glasnik RS", br. 52/05) i

legal enforcements against the judgment debtor - privatisation subject, and allow for legal enforcement in many other cases, or by the changes introduced in Article 23-a) of the Law on Amendments to the Privatisation Law, in view of the fact that the program of restructuring of the debtor was adopted, and in the sense of the said Article para 1 and 2 the same entity had become the executive title, thus the Court being rendered unable to execute legal enforcement on the grounds of previously pronounced decrees on execution, and neither allow execution to be carried out in the new cases.

In the elaboration of the request for initiating the proceedings for the ruling on the disputable legal matter, it was stated that the Municipal Court in Kragujevac, during the years 2002, 2003, and 2004, on the basis of the enforceable writs (final judgments) at the proposals of creditors, passed a number of decisions on legal enforcement against the debtor DP Industrija "Filip Kljajic" of Kragujevac, for purpose of settling claims of creditors, thereupon the decisions were passed on the adjournment of the legal enforcement procedure in accordance with provisions of Article 20 para 4 of the Privatisation Law ("Official Gazette of Republic of Serbia", No. 38/01 and 18/03), in view of the fact that on 1 September 2004 the Privatisation Agency of the Republic of Serbia passed the decision on the restructuring of the debtor company.

Mindful of the fact that against the debtor a decision was passed on restructuring prior to the coming into force of the Law on Amendments to the Privatisation Law ("Official Gazette of Republic of Serbia", No. 45/05), which had come into force on 8 June 2005, in these cases Article 31 para 1 was applied of the said Law prescribing that against the privatisation subject, i.e. against his assets, for which until the day of coming into force of this Law the decision was passed on restructuring, it is no longer allowed to pronounce and execute legal enforcement, and neither any other measure in the procedure of enforcement for purpose of settling claims, and this within a time period of one year from the day of coming into force of this Law, while in para 3 of the same Article it is prescribed that the procedure of legal enforcement, which is in progress, shall be adjourned.

However, Privatisation Agency of the Republic of Serbia, in accordance with the provisions of Article 25-a) of the Privatisation Law, with its findings passed on 2 June 2006 and 4 September 2006, kept suspending privatisation procedure of the debtor (before the expiry of the time period of one year as prescribed under Article 31 para 1 of the Law on Amendments and Supplements to the Privatisation Law) for the entire duration of a period when the reasons preventing the sale of capital, i.e. assets, had prevailed, but not later than 90 days from the date of passing of the relevant findings. And as in the same findings it was pronounced that while the adjournment of the privatisation procedure continues, all the prescribed deadlines shall be suspended (therefore also the time period of one year prescribed under Article 31 para 1 of the Law on Amendments to the Privatisation Law), thus the deadline prescribed under Article 31 para 1 of the Law on Amendments to the Privatisation Law expired on 4 December 2006.

On 4 December 2006, Privatisation Agency of the Republic of Serbia passed its findings that the privatisation procedure of the privatisation subject shall continue (privatisation of the judgment debtor). In addition, on 11 October 2006, the Agency passed a decision on the acceptance of the Restructuring programme for the said privatisation subject.

Creditors, in December 2006, submitted proposals for the continuation of the legal enforcement procedure against the debtor, stating that the period of one year had elapsed for the adjournment of the procedure as prescribed under Article 31 para 1 of the Law on Amendments to the Privatisation Law, and also proposed that the legal enforcement be permitted in the new cases.

However, debtor was of the view that against him, as the privatisation subject, legal enforcement can not be permitted, and neither continuation of the legal enforcement execution, as the restructuring procedure is in its final phase, and as the Privatisation Agency of the Republic of Serbia had, on 11 October 2006, passed a decision on the acceptance of the restructuring programme, which is having the legal force of an executive writ and is deemed to be a contract prescribing the amount and manner of settlement of creditors' claims, in

Uredba o načinu i uslovima izmirivanja obaveza subjekata privatizacije prema poveriocima ("Službeni glasnik RS", br. 45/2006).

Prema sadržini priloženih predmeta Agencija za privatizaciju je 01.09.2004. godine donela odluku o restrukturiranju izvršnog dužnika u postupku privatizacije, a rešenjem suda od 21.09.2004. godine prekinut je postupak sprovođenja izvršenja određenog rešenjem od 12.12.2002. godine i to u skladu sa pravnim shvatanjem Građanskog odeljenja Vrhovnog suda Srbije usvojenim na sednici od 30.06.2003. godine.

Pošto je odluka o restrukturiranju subjekta privatizacije kao izvršnog dužnika doneta pre donošenja Zakona o izmenama i dopunama Zakona o privatizaciji ("Službeni glasnik RS", br. 45/2005) u skladu sa odredbama člana 31. stav 1. navedenog Zakona došlo je do prekida postupka prinudnog izvršenja sa rokom od godinu dana od stupanja na snagu zakona, koji rok je trajao do 08.06.2006. godine.

Kako je prema navodima zahteva i prema sadržini spisa Agencija za privatizaciju 02.06.2006. godine donela prvi zaključak o prekidu postupka privatizacije, a 04.09.2006. godine drugi zaključak o prekidu postupka privatizacije, stvoreni su uslovi za prekid zakonom propisanih rokova zabrane određivanja ili sprovođenja prinudnog izvršenja i bilo koje mere postupka izvršenja radi namirenja potraživanja prema subjektu privatizacije za sve vreme dok prekid traje, a najduže do isteka roka od 90 dana, što je u skladu sa pravnim shvatanjem Građanskog odeljenja Vrhovnog suda Srbije od 22.12.2006. godine u vezi primene odredbi člana 14. Zakona o privatizaciji o izmeni člana 25-a) stav 1. Zakona o privatizaciji.

Sve navedeno je i odgovor na postavljeno sporno pravno pitanje do kada traje prekid postupka izvršenja prema odredbama člana 31. Zakona o izmenama Zakona o privatizaciji.

Prema navodima zahteva i sadržini priloženih predmeta Opštinskog suda u Kragujevcu Agencija za privatizaciju je 11.10.2006. godine donela rešenje o prihvatanju Programa restrukturiranja subjekta privatizacije, a zaključkom Agencije za privatizaciju od 04.12.2006. godine nastavljen je postupak privatizacije.

Pošto je prema izloženom okončan postupak restrukturiranja subjekta privatizacije, više ne postoje uslovi za prekid postupka izvršenja protiv subjekta privatizacije kao izvršnog dužnika.

Navedeni zaključak otvara i sporno pravno pitanje karaktera i dejstva usvojenog programa restrukturiranja subjekta privatizacije.

Prema članu 19. stav 2. Zakona o izmenama i dopunama Zakona o privatizaciji, restrukturiranje u postupku privatizacije predstavlja promene koje se odnose na subjekt privatizacije i njegova zavisna preduzeća koje omogućavaju prodaju njegovog kapitala ili imovine. Postupak restrukturiranja započinje donošenjem odluke o restrukturiranju od strane Agencije za privatizaciju. Državni poverioci su dužni da pismeno prijave svoja potraživanja dospela do 31.12.2004. godine u roku od 15 dana od dana objavljivanja odluke o restrukturiranju radi otpusta duga i namirenja svojih potraživanja iz sredstava ostvarenih od prodaje kapitala ili imovine subjekta privatizacije, što mogu učiniti i ostali poverioci u skladu sa članom 20, članom 20-a) stav 1. i članom 20-g) Zakona. Sledeća faza je izrada programa restrukturiranja, koji se smatra donetim kada Agencija donese odluku o prihvatanju programa restrukturiranja shodno članu 23. stav 8. Zakona. Sadržina programa restrukturiranja je regulisana odredbama člana 23. stav 1. citiranog Zakona i članom 13. stav 1. Uredbe o postupku i načinu restrukturiranja subjekta privatizacije, prema kojima program restrukturiranja sadrži i način otplate dugova subjekta restrukturiranja, pa istim može biti predviđeno i odlaganje izmirenja obaveza. U smislu člana 23-a) Zakona o privatizaciji, doneti program restrukturiranja ima snagu izvršne isprave i smatra se ugovorom kojim se utvrđuje visina i način izmirivanja potraživanja poverilaca koja su u njemu utvrđena, a ako se po donošenju programa restrukturiranja protiv subjekta privatizacije pokrene postupak pred nadležnim organom, isti je dužan da, u slučaju kada je potraživanje osnovano, obaveže subjekt privatizacije na isplatu potraživanja na način predviđen programom restrukturiranja.

Navedeno dejstvo prihvaćenog programa restrukturiranja subjekta privatizacije može se prihvatiti kao nesporno u odnosu na državne poverioce, koji su po zakonu bili dužni da

the spirit of Article 23-a) para 1 of the Law on Amendments to the Privatisation Law.

Finally, it was stated that in the opinion of the Court, terms prescribed in Article 31 of the Law on Amendments to the Privatisation Law are set with the aim of accelerating privatisation procedure, from the moment of passing the decision on privatisation, and that the adjournment of the legal enforcement procedure was prescribed in order to implement the restructuring and bring the subject into a state of economic stability.

The Supreme Court finds that the matter at hand is a disputable legal matter of a prejudicial significance and this in a large number of cases, thus justifying the request for its deliberation and pronouncement of a legally reasoned argumentation in accordance with the provisions of Articles 176 to 180 of the Procedural Law.

Legal sources of privatisation are the Privatisation Law ("Official Gazette of Republic of Serbia", No. 38/01, 18/03 and 45/05), Privatisation Agency Law ("Official Gazette of Republic of Serbia", No. 38/01 and 135/04), and the Auction Fund Law ("Official Gazette of Republic of Serbia", No. 38/01 and 45/05), and also the by-laws Regulation on the procedure and manner of restructuring privatisation subjects ("Official Gazette of Republic of Serbia", No. 52/05), and the Regulation on the terms and conditions for settling liabilities of the privatisation subjects towards their creditors ("Official Gazette of Republic of Serbia", No. 45/2006).

According to the contents of the submitted cases, Privatisation Agency has, on 1 September 2004, passed a decision on the restructuring of the judgment debtor in the process of privatisation, and by the decree of the court passed on 21 September 2004, the procedure of legal enforcement was adjourned as pronounced in the decree of 12 December 2002, all this in accordance with the legal reasoning of the Civil Division of the Supreme Court of Serbia adopted at its session held on 30 June 2003.

As the decision on restructuring of the privatisation subject as the judgment debtor was passed prior to the adoption of the Law on Amendments to the Privatisation Law ("Official Gazette of Republic of Serbia", No. 45/2005) in accordance with provisions of Article 31 para

1 of the said Law, there was an adjournment of the procedure of legal enforcement for the time period of one year from the date of coming into force of the Law, and this deadline continued up to 8 June 2006.

According to the statements contained in the request and according to the contents of the writs, Privatisation Agency had on 2 June 2006 passed its first findings on the adjournment of the privatisation procedure, and on 4 September 2006 passed its second findings on the adjournment of the privatisation procedure, thus creating conditions for the suspension of the legally prescribed deadlines for the prohibition of pronouncing or executing legal enforcement and any other measures of the legal enforcement procedure for purpose of settling claims against the privatisation subject, for the entire duration of the period of adjournment, but not later than a time period of 90 days, which is concordant with the legal reasoning of the Civil Division of the Supreme Court of Serbia rendered on 22 December 2006, in connection with the application of the provisions prescribed under Article 14 of the Privatisation Law on the amendments to Article 25-a) para 1 of the Privatisation Law.

All the above stated is a response to the raised disputable legal matter as to the duration of the period of adjournment in the procedure of legal enforcement under provisions of Article 31 of the Law on Amendments of the Privatisation Law.

According to the statements made in the request and the contents of the enclosed cases judged by the Municipal Court in Kragujevac, Privatisation Agency has on 11 October 2006 passed a decision on accepting the Restructuring programme of the privatisation subject, and in the findings of the Privatisation Agency of 4 December 2006, privatisation procedure was continued.

Mindful of the fact that according to the above stated the procedure of restructuring of the privatisation subject had been completed, conditions have ceased to prevail that would allow for the adjournment of the legal enforcement procedure to be executed against the privatisation subject as a judgment debtor.

The above stated findings also open the disputable matter of the character and legal

otpuste dug prema subjektu privatizacije i na poverioce koji su otpustili dug prema subjektu privatizacije prijavom svojih potraživanja.

Pojavljuje se sporno pravno pitanje da li se otpust duga i pravo na namirenje iz prodajne cene u skladu sa prihvaćenim programom restrukturiranja odnosi i na ostale poverioce ili samo na državne poverioce i poverioce koji su prijavili potraživanja navedena u članu 2. stav 1. tačka 5. Uredbe o načinu i uslovima izmirivanja obaveza subjekta privatizacije prema poveriocima.

Odredbama člana 20. Zakona o izmenama i dopunama Zakona o privatizaciji propisana je obaveza državnih poverilaca da otpuste dug prema subjektu privatizacije u celini i svoje potraživanje namire iz sredstava ostvarenih od prodaje kapitala ili imovine subjekta privatizacije, a ostalim poveriocima je data mogućnost otpusta duga i namirenja potraživanja na isti način. U stavu 4. navedenog člana je predviđeno da ostali poverioci, koji nisu otpustili dug prema subjektu privatizacije, uslove i način namirenja svog potraživanja određuju u sporazumu sa kupcem kapitala subjekta privatizacije. Iz navedenih zakonskih odredbi proizilazi da ostali poverioci, koji nisu otpustili dug prema subjektu privatizacije, svoja potraživanja namiruju od subjekta privatizacije kao dužnika, s tim što se o uslovima i načinu namirenja mogu sporazumeti sa kupcem kapitala.

Odredbama člana 3. Uredbe o načinu i uslovima izmirivanja obaveza subjekta privatizacije prema poveriocima, prema kojima poverilac prijavljuje svoje potraživanje na osnovu javnog poziva za prijavu potraživanja koji objavljuje Agencija za privatizaciju, i u odredbama člana 27. iste Uredbe, poverilac koji nije otpustio dug prema subjektu privatizacije namiruje svoje potraživanje iz prodajne cene

ravnopravno sa poveriocem koji je otpustio svoj dug, u skladu sa ugovorom koji se zaključuje sa subjektom privatizacije, pre prodaje imovine subjekta privatizacije, a poverilac koji nije otpustio dug prema subjektu privatizacije i koji nije zaključio ugovor namiruje se u visini srazmernoj njegovom potraživanju u ukupnim potraživanjima poverilaca koji nisu otpustili dug prema subjektu privatizacije, u skladu sa prihvaćenim programom restrukturiranja subjekta privatizacije, a potraživanje poverioca koji nije otpustio dug prema subjektu privatizacije smatra se izmirenim u potpunosti ako je izmireno na način propisan ovim članom. Iz ovog bi proizilazilo da nakon prihvatanja programa restrukturiranja subjekta privatizacije sud postupa u skladu sa ovim programom.

Pošto prema izloženom postoji suprotnost između odredbi zakona i Uredbe, primenom načela o hijerarhiji opštih pravnih akata, potrebno je primeniti odredbe Zakona o izmenama i dopunama Zakona o privatizaciji, koji u pogledu dejstva prihvaćenog programa restrukturiranja subjekta privatizacije pravi razliku između poverilaca koji su otpustili dug i poverilaca koji to nisu učinili. Ne postoji zakonski osnov da se delimično anuliraju potraživanja poverilaca koji nisu bili u obavezi da otpuste dug subjektu privatizacije, niti su to dobrovoljno učinili. U postupku privatizacije dolazi samo do promene strukture kapitala subjekta privatizacije, ali on ostaje isto pravno lice kao i pre sprovedenog postupka privatizacije kapitala, a samim tim i dužnik iz osnovnog pravnog posla iz koga je proisteklo potraživanje poverilaca.

*(Pravno shvatanje Građanskog odeljenja
Vrhovnog suda Srbije, utvrđeno i verifikovano na
sednici od 25. oktobra. 2007. godine)*

effect of the adopted restructuring program for the privatisation subject.

Under the provisions of Article 19 para 2 of the Law on Amendments to the Privatisation Law, restructuring in the course of the privatisation process represents changes that pertain to the privatisation subject and his dependent companies, allowing for the sale of his capital or assets. Restructuring procedure starts with the passing of the decision on restructuring by the Privatisation Agency. Nation State creditors must report in writing their claims due by 31 December 2004 within 15 days from the date of publishing the decision on restructuring, for purpose of releasing the debt and settlement of their claims from the funds acquired through the sales of capital or assets of the privatisation subject, and this can also be done by other creditors in accordance with Article 20, Article 20-a) para 1 and Article 20-d) of the Law. The next phase is the drafting of the restructuring programme, which is deemed to have been passed once the Agency passes its decision on the acceptance of the restructuring programme as prescribed in Article 23 para 8 of the Law. The contents of the restructuring programme are regulated under the provisions of Article 23 para 1 of the said Law, and Article 13 para 1 of the Regulation on the procedure and manner of restructuring of the privatisation subjects. Under these articles, restructuring programme also contains the manner of debt repayment by the restructuring subject, and they can also prescribe the postponement of the settlement of liabilities. Under Article 23-a) of the Privatisation Law, the adopted restructuring programme has the legal effect of the executive document and is deemed to be the contract prescribing the amount and manner of settlement of the creditors' claims as presented therein, and if after the adoption of the restructuring programme against the privatisation subject a court procedure shall be initiated before the competent authority, that authority must determine that the claim is well grounded, thereupon binding the privatisation subject to pay the claims in the manner prescribed by the restructuring programme.

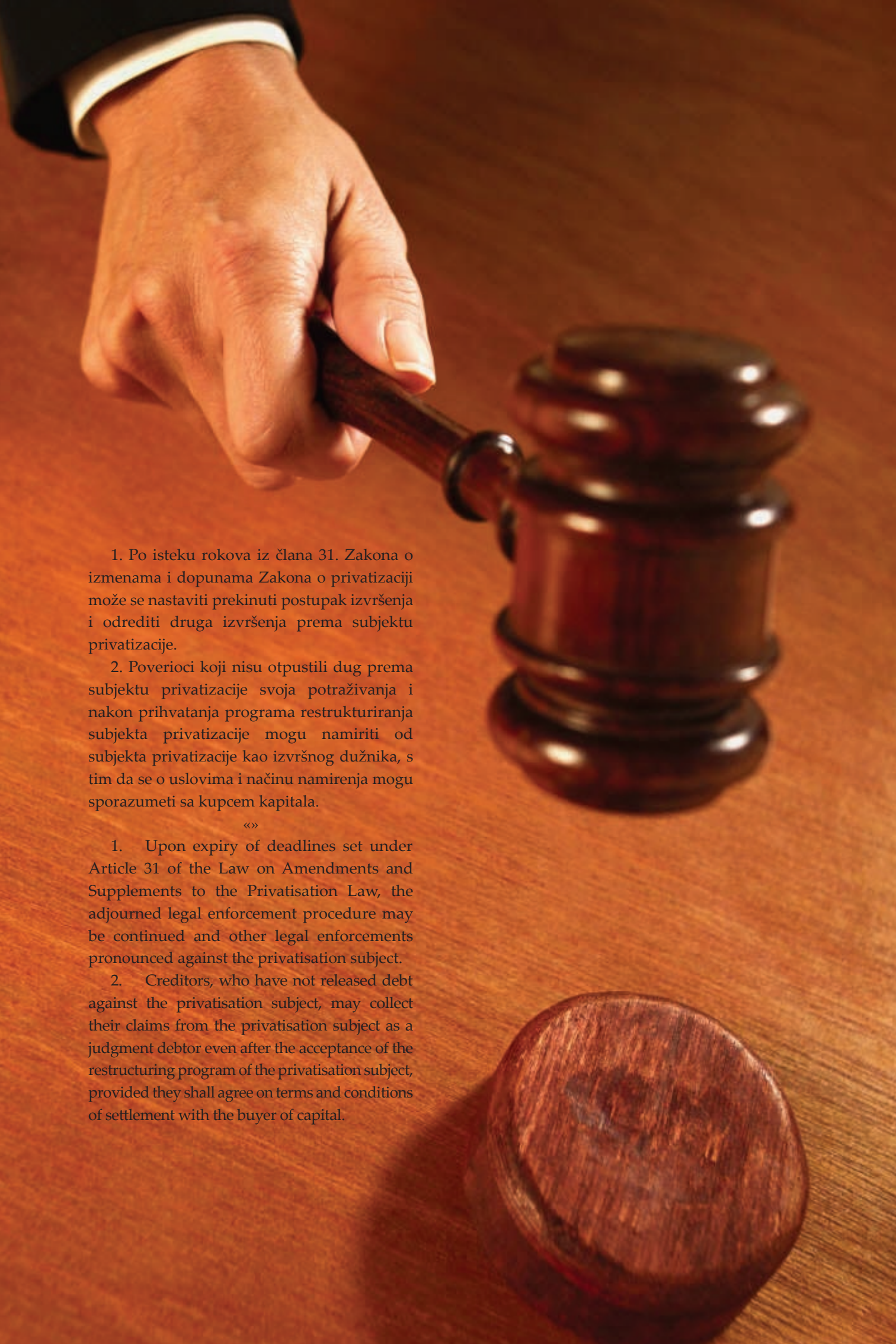
The above stated effect of the adopted restructuring programme of the privatisation subject may be accepted as undisputable in respect to the nation state creditors, which have

been by law obliged to release the debt against the privatisation subject, and the creditors who have released the debt against the privatisation subject by reporting, filing their claims.

The disputable legal matter appears as to whether the debt release and the right to settlement from the sales price, in accordance with the adopted restructuring programme, pertains also to the other creditors, or only to the Nation State ones and the creditors who have filed their claims as prescribed in Article 2 para 1 item 5 of the Regulation on the terms and conditions of settling liabilities of the privatisation subject towards its creditors.

Under provisions of Article 20 of the Law on Amendments to the Privatisation Law the obligation is prescribed for the nation state creditors to release the debt against the privatisation subject in its entirety and to settle their claims from the funds acquired through the sale of capital or assets of the privatisation subject, while the other creditors are given the option to release the debt and seek settlement of claims in the same manner. In para 4 of the said Article it is prescribed that the other creditors, who have not released the debt against the privatisation subject, may determine terms and conditions of settlement of their claims in the contract concluded with the buyer of capital of the privatisation subject. The above stated legal provisions indicate that other creditors, who have not released the debt against the privatisation subject, may settle their claims from the privatisation subject as the debtor, provided the terms and conditions of the settlement are agreed with the buyer of capital.

Provisions under Article 3 of the Regulation of the terms and conditions for settlement of liabilities of the privatisation subject against the creditors, according to which the creditor shall file his claims on the basis of the public call for filing claims as published by the Privatisation Agency, and provisions of Article 27 of the same Regulation, the creditor who has not released the debt against the privatisation subject shall settle his claim from the sales price equitably with the creditor who has released his debt, in accordance with the contract concluded with the privatisation subject, and this prior to the sale of assets of the privatisation subject. The creditor that has not released his debt against



1. Po isteku rokova iz člana 31. Zakona o izmenama i dopunama Zakona o privatizaciji može se nastaviti prekinuti postupak izvršenja i odrediti druga izvršenja prema subjektu privatizacije.

2. Poverioci koji nisu otpustili dug prema subjektu privatizacije svoja potraživanja i nakon prihvatanja programa restrukturiranja subjekta privatizacije mogu namiriti od subjekta privatizacije kao izvršnog dužnika, s tim da se o uslovima i načinu namirenja mogu sporazumeti sa kupcem kapitala.

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1. Upon expiry of deadlines set under Article 31 of the Law on Amendments and Supplements to the Privatisation Law, the adjourned legal enforcement procedure may be continued and other legal enforcements pronounced against the privatisation subject.

2. Creditors, who have not released debt against the privatisation subject, may collect their claims from the privatisation subject as a judgment debtor even after the acceptance of the restructuring program of the privatisation subject, provided they shall agree on terms and conditions of settlement with the buyer of capital.

the privatisation subject and who has not concluded the contract shall settle his claim in the amount proportionate to his claim in the total claims of creditors who had not released their debt against the privatisation subject, in accordance with the adopted program for restructuring of the privatisation subject, and the claims of the creditor who did not release his debt against the privatisation subject shall be deemed settled in full if settled in the manner prescribed in this Article. This would indicate that after the adoption of the restructuring programme for the privatisation subject, the court shall proceed in the manner concordant with this programme.

As the above stated tends to highlight the presence of certain contradiction between the provisions of the Law and those of the Regulation, by applying the principle of hierarchy of the general legal acts, it is necessary to apply provisions of the Law on Amendments

to the Privatisation Law, which are making a distinction regarding the effects of the adopted restructuring programme of the privatisation subject between the creditors who have released the debt and those creditors that have not done so. There are no legal grounds for any partial annulment of the creditors' claims when they were in no obligation to release debt against the privatisation subject, and neither volunteered to so proceed. In the privatisation process what occurs is only the change in structure of the capital of the privatisation subject, but he still remains the same legal entity as before the implemented procedure of the capital privatisation, and thus also the debtor from the basic legal case that served as grounds for the claims to be made by the creditors.

(Legal reasoning rendered by the Civil Division of the Supreme Court of Serbia, as certified and verified at the session held on 25 October 2007)